In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 782

CALIFORNIA RETAIL GROCERS & MERCHANTS ASSOCIATION, LTD., a corporation, CENTRAL CALIFORNIA RETAIL GROCERS & MEAT DEALERS ASSOCIATION, a corporation, CENTRAL COAST COUNTIES ASSOCIATION OF RETAIL GROCERS, INC., a corporation, FOOD TRADES INSTITUTE, INC., a corporation, FOOD INDUSTRY BUREAU, INC., a corporation, KERN COUNTY RETAIL GROCERS & MERCHANTS ASSOCIATION, a corporation, RETAIL GROCERS ASSOCIATION OF ALAMEDA COUNTY, a corporation, RETAIL GROCERS ASSOCIATION OF SAN FRANCISCO, LTD., a corporation, TULARE-KINGS RETAIL GROCERS ASSOCIATION, CONTRA COSTA COUNTY RETAIL GROCERS ASSOCIATION, YOSEMITE EMPIRE RETAIL GROCERS ASSOCIATION, SONOMA COUNTY RETAIL GROCERS ASSOCIATION, FRESNO COUNTY RETAIL GROCERS ASSOCIATION, WILLIAM D. HADELER, F. A. TISSIER, F. H. McFARLAND, A. H. ROLFES, GRACE GASPAR, J. N. SHOULTS, W. C. MILLER, FRED VERLEGER and I. H. WALLACE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of

Appeals for the Ninth Circuit (R. 1112), affirming judgments of the United States District Court for the Northern District of California, Southern Division (R. 864-886).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1097-1112) has not yet been reported. The District Court rendered no formal opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 30, 1943 (R. 1113). A timely petition for rehearing was filed January 25, 1944, and denied February 16, 1944 (R. 1113). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347).

QUESTIONS PRESENTED

Two questions are involved:

(1) Does associated activity for the bona fide purpose of enforcing a *State Unfair Practices Act* (specifically, the *California Unfair Practices Act*), not going beyond that Act, violate the Sherman Antitrust Act?

(2) Where the defendants' activities are wholly local and intrastate, are directed only to intrastate distribution and do not in any way impair or diminish the flow of groceries into the state, and where the purpose and objective are to affect the retail price of groceries sold within the state to consumers by local

retailers, with no intent to restrain interstate commerce, is interstate commerce involved so as to bring the case within the purview of the Sherman Act, merely because some groceries have come into the state from without, first coming to rest within the state in central warehouses or on retailers' shelves before the retail sales?

Shortly stated, is a retail sale of groceries from the retailer's shelves to the ultimate consumer still in the "stream of interstate commerce"?

STATUTES INVOLVED

The statutes involved are:

(1) Section 1 of the *Sherman Antitrust Act* (15 U.S.C., Sec. 1), viz.:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *."

(2) *State Unfair Practices Acts;* specifically, the *California Unfair Practices Act* (Stats. 1935, Ch. 477, p. 1546; amended by Stats. 1937, Ch. 860, p. 2395; Stats. 1939, Ch. 175, p. 1424; distributed, by Stats. 1941, Ch. 526, p. 1847, throughout Ch. IV of California Business and Professions Code).

This Act is set out in the Appendix. Briefly:—it illegalizes (a) the sale of any goods below cost plus cost of doing business with intent to injure competitors or destroy competition, and (b) loss-leader sales, defined as sales below cost to encourage purchase of other articles or which divert trade from others (Section 3). Violations are misdemeanors, may also be enjoined in a civil action, and are the basis of civil actions for

damages. The Act provides that it may be enforced by trade associations (Section 10),[1] that intent to injure a competitor is presumed from evidence of a sale below cost plus the fact that a competitor is injured, and that cost surveys in a trade are competent evidence in determining whether a sale is below cost (Section 5).

STATEMENT OF THE CASE

The petitioner California Retail Grocers & Merchants Association, Ltd. is a long-established trade association of independent (non-chain) retail grocers in Northern California. The other petitioners are affiliated local retail grocers' associations (representing about 1,500 independent retail grocers in Northern California), and officers of the various associations.

Petitioners were indicted for a conspiracy to fix retail prices of groceries sold in Northern California by retail grocers there located, in alleged violation of Section 1 of the Sherman Act (Indictment, para. 22; R. 12). Apart from the issue of interstate commerce, their defense was that they had merely associated together for the purpose of enforcing the State Unfair Practices Act in the retail grocery trade in Northern California. A jury having been waived, petitioners were tried and convicted by the court. The Circuit Court of Appeals affirmed the convictions.

Although the indictment had been couched in general language susceptible of being construed as charging that the petitioners had gone beyond and outside the Unfair Practices Act, government counsel decided to use the case as a test case by which to obtain a decision that *mere associated enforcement*

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1. The purpose of this section was to permit the trades to be policed under their respective trade associations in California. E. T. Grether, "*Legislation Restricting Price Cutting*," 24 Cal. Law Rev., at 647.

of the State Unfair Practices Act in and of itself violated the Sherman Act. In short, they contended that the defense was insufficient, not in point of fact, but in point of law. Several months previously, under a somewhat similar indictment in the Southern District of California against a different group of associations operating in that area, the government had chosen to present its case on the theory that the defendants there had not in fact sought to enforce the State Act but had gone outside of it. The District Court (Yankwich, D. J.) there stated by way of dictum that bona fide enforcement of the State Act would not violate the Sherman Act, but it convicted the defendants on a finding of fact, in accordance with the government's contention, that they had engaged in a price-fixing conspiracy without regard to the limitations of the State Act. (*United States v. Food and Grocery Bureau, etc., et al.,* 43 F. Supp. 966, 43 F. Supp. 974). Having succeeded on that moderate theory of law in the *Southern* case, the government here struck out on a bolder course and sought to establish the principle that an association only for the purpose of enforcing the State law, not going beyond it in any respect, necessarily violated the Sherman Act; and with this position the trial court agreed.

To this end, in direct contrast to the *Southern* case, the government made no attempt to offer evidence that the defendants had gone beyond the State law but rested its case upon proof of activities which substantially the petitioners admitted. Conversely, the government objected to evidence offered by petitioners to prove that they had merely acted in good faith to enforce the State law and had stayed within its confines. Much of this evidence was rejected when offered.[2] At

2. For example: R. 771-774; Def. Ex. U for Identification, R. 774-778, Assignment of Errors 46-47, R. 925-930; R. 608, Assignment of Error 49, R. 931; R. 733-734, Assignment of Error 78, R. 962; R. 673, Assignment of Error 58, R. 939; R. 680, Assignment of Error 60, R. 943; R. 688, Assignment of Error 62, R. 945; R. 764, Assignment of

the close of the case, in order to focus the issue even more sharply, the government moved to strike great quantities of the defendants' evidence, both oral and documentary, which had been received, and the motion was granted.[3]

Briefly, the record is only that petitioners had done what they admitted they had done. They had called mass meetings of grocers and had sent to them lists and bulletins, advising of the State Act, of cost surveys, and of retail prices below which it would be supposed that loss-leader and below-cost selling was being practiced, and informing the trade that such sales would be investigated and reported to the local district attorneys for inquiry and legal proceedings under the State law.

Severely summarizing, the evidence excluded and stricken included the following matters: the cost of doing business in the retail grocery trade in the pertinent areas of California; cost surveys made by petitioners under the State Act and cost surveys by State officials; evidence that petitioners' activities were carried out in reliance on these surveys, that petitioners acted in conjunction with, upon the advice and instructions of, and upon standards approved by, local district attorneys in enforcing the State law; evidence that sales below cost in the retail grocery trade always injure competitors, so that in every case of below-cost selling an inference of intent to injure competitors or competition is permissible; evidence that the prices contained in petitioners' bulletins were in no instance greater than the lowest

3. R. 838-854; 693-729; 676-677; 690-692; Assignments of Error 41-45 (R. 912-925); 48 (R. 930); 50-57 (R. 931-939; 59 (R. 939); 61 (R. 944); 63-66 (R. 945-948); 68-70 (R. 949-950).

Error 67, R. 948; R. 628, Assignment of Error 72, R. 950; R. 628, Assignment of Error 73, R. 951-955; R. 681-687, Assignment of Error 75, R. 956; R. 729-733, Assignment of Error 77, R. 958-962; Def. Ex. T-5 for Identification, R. 770, Assignment of Error 80, R. 964; R. 781, Assignment of Error 81, R. 965; R. 782-783, Assignment of Error 82, R. 965; R. 783, Assignment of Error 84, R. 966.

possible cost of merchandise plus a cost margin below which no grocer could do business, that they were so calculated, and were circulated as information; evidence that the trade was advised that it was merely expected to conform to the State law, that petitioners circulated copies of the State law and fairly explained it in detail, both in writing and at mass meetings addressed by district attorneys; evidence that the purpose and intention of petitioners and of their bulletins were to inform the grocers of figures below which it was believed that they could not sell "unless they could justify it under the Unfair Practices Act" (e.g., Assignment of Error 61, R. 944), and that the bulletins were so understood by the trade.

The District Court ruled that the Unfair Practices Act was a wholly immaterial factor. It declined to consider or decide the question of fact whether petitioners' activities were confined to enforcing that law. The theory of the prosecution and of the convictions is sharply epitomized in statements of government counsel and in numerous statements of the trial court tantamount to an informal opinion. We briefly quote some of them as a summary mode of stating the facts:

> "The District Court ruled with the Government and *excluded evidence offered to prove that appellants' conduct was allowable under the Unfair Practices Act* (R. 852-54)." (Government's brief in the Circuit Court of Appeals, p. 88.)
>
> "The Court *must* look to the facts in the case *without reference to the Unfair Practices Act* and determine whether they amount to a conspiracy to fix prices within the scope of the Sherman Antitrust Act. If they do, then an asserted defense based on *the Unfair Practices Act is irrelevant.*" (Ibid, p. 101.)
>
> "* * * *The Government takes the position that the State statute is immaterial in this case.*

* * * *That is our position in that respect.* Now, despite the presence of a document which refers to the Unfair Practices Act, or a discussion of that Act, *that Act still remains immaterial to the central issue of the case,* which is price fixing. The same thing goes for any discussion of the conduct of District Attorneys." (Government's opening statement at trial; R. 44, 45.)

"Mr. Bradley: Briefly, the Government takes the position the Constitution confides to the Congress full authority over the subject of commerce. Congress has legislated in that field in so far as the issues in this case are concerned through the medium of the Sherman Anti-Trust Act and kindred laws. * * * In such a situation, we hold that *any element relative to the enforcement of the California Unfair Practices Act,* any testimony as to good faith on the part of these defendants or their associates, any evidence as to what a local district attorney may or may not have done, or *any evidence of a similar vein is wholly irrelevant and immaterial in this case.*" (Statement at the trial by government counsel of basic position; R. 433, 434.)

"The Court: *I am not here called upon to pass in any manner on the state law.* The issue here is a violation of the Sherman Anti-Trust Act, which contains a price-fixing prohibition. What method you use in doing that is to me immaterial. If the ultimate result is price fixing, it is a violation.

Mr. Lasky: We are not fixing a price if we are enforcing the State Act against anyone violating it. As I said in my opening statement, by enforcing the State Act we necessarily affect prices.

The Court: If you violate the federal law you will have to accept it and recognize it.

Mr. Lasky: Then your Honor says that your Honor's conclusion is necessarily at variance with that of Judge Yankwich, because there is not any way we could enforce the state law without affecting prices.

The Court: If you fix prices it is a violation of the Sherman Anti-Trust Act regardless of what Judge Yankwich or anyone else said.

Mr. Lasky: * * * Let me call on Government counsel to find out what their position is.

Mr. Bradley: The court has stated Government counsel's idea of the law, exactly." (R. 436)

Judge Yankwich's view, here explicitly rejected by the trial court, is described by the Circuit Court of Appeals[4] thus: That there is no violation of the Sherman Act if the parties' activities are confined to making effective the California Unfair Practices Act (R. 1083-1084).

Interstate Commerce.

The state of the record concerning the issue of interstate commerce may most briefly be summarized in the concessions of government's brief below. It was there agreed that petitioners' acts were wholly local (Gov. Br., pp. 37-59), that the alleged restraints imposed by them were "imposed on or by intrastate activities" (Gov. Br., pp. 37, 38), that the alleged "price fixing conspiracy [was] on intrastate distribution" (Gov. Br., p. 71), *and that petitioners' activities in no way impaired or diminished the flow of goods into California* (Gov. Br., p. 77). It was further conceded that petitioners had no intent to restrain interstate commerce (Gov. Br., pp. 56-58). In this connection it is to be observed that the trial court excluded all evidence offered by petitioners as to their intent and lack of purpose to affect interstate commerce.[5]

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4. In its opinion in *Food and Grocery Bureau v. United States*, No. 10,109, decided the same day as the instant case, affirming *United States v. Food and Grocery Bureau, etc., et al.*, supra. That opinion is referred to in the opinion in the instant case, and it is set forth in the record here, at R. 1082-1097.

5. E. g., Assignments of Error 50, 51, 57, 61, 69, 76, 79; R. 931, 934, 938, 939, 944, 958, 964.

Baldly, the entire proof by the government is that *some* groceries sold in California originally came into the state from without.

The great bulk is manufactured or processed in California itself.[6] Of the remainder, much is acquired by California wholesalers or retailers from stocks maintained in California by the manufacturer. Of what is left, the bulk is shipped from without to California wholesalers, cooperative jobbers or chain organizations, and is placed in central warehouses in California. The groceries remain in the warehouses for varying periods of time, averaging 2½ weeks to 6 months. Thence they are distributed in the ordinary course of trade to retailers or retail outlets.[7] They are acquired and placed in these warehouses, not to supply any particular or identifiable retail outlet, but "merely * * * to fill orders we anticipate getting" (R. 367), "to meet anticipated orders from the trade" (R. 383), "so that we have enough stock on hand to anticipate orders" (R. 428), to supply retail outlets "in California as those retail stores order them" (R. 398), "as they require them, as they need them" (R. 405).[8] Only a minute fraction comes from without the state directly to retail stores. The alleged conspiracy related to the subsequent retail sale from the grocer's shelves.

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6. The record permits no precise statement of proportions; less than 12½% of the total consumption appears to have originated out of state. U. S. Exs. 66 (R. 372), 69 (R. 378); R. 378, 383, 384, 385; U. S. Exs. 72 (R. 408), 73 (R. 412); R. 427, 409, 428, 572.

7. R. 411, 426, 382, 366, 372, 374, 398, 402, 403, 405, 406, 571.

8. A remarkably apt analogy from a government witness, a chain-store executive:

> "we might liken a warehouse to a lake. You have tributaries of the watershed running into the lake and they are bringing waters from many different sources. That is like a warehouse. The sources come from interstate, intrastate, and they are commingled on the floor of the warehouse, or in the body of the lake. On the other end of the lake is an out-take that takes another mixture altogether different from the mixture that came in, but it is still food products." (R. 401)

The sufficiency of the proof with respect to interstate commerce was challenged by motions to dismiss (R. 597, 854), which were denied (R. 603, 854; Assignments of Error 3, 16, 17, R. 899, 906).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In failing to hold that associated activity for the purpose of enforcing the State Unfair Practices Act does not violate the Sherman Act.

(2) In holding that interstate commerce is involved so as to bring the case within the purview of the Sherman Act.

(3) In arriving at its decision upon grounds not available to it in view of the issues framed in the trial court and the exclusion of evidence.

(4) In affirming the convictions.

REASONS FOR GRANTING THE WRIT

1. The decision affirmed by the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court, and it has done so in a way which is in conflict with applicable decisions of this Court.

Thirty states have adopted *Unfair Practices Acts* modeled on the California Act.[9]

The Act declares its purpose to be the safeguarding of the public against the creation or perpetration of monopolies and the fostering and encouraging of competition by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discrimi-

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9. Listed in 2 *C. C. H. Trade Regulation Service* (9th ed.), at p. 7503.

natory practices by which fair and honest competition are destroyed or prevented (Section 13).[10]

These statutes represent the adoption by state legislatures of an economic and social policy that price cutting adversely affects the public interest. In cases involving Fair Trade Acts (relative to resale price maintenance), the same underlying policy has been upheld as within the competency of the states to adopt. (*Old Dearborn Co. v. Seagram-Distillers Corp.*, 299 U.S. 183; *Kunsman v. Max Factor & Co.*, 299 U.S. 198; *Max Factor & Co. v. Kunsman*, 5 Cal.(2d) 446, 55 Pac.(2d) 177.)[11]

While State *Unfair Practices Acts* strictly of the California type are said not to be "price-fixing" statutes,[12] as in certain phases they require an intent to injure competition, obviously they necessarily do affect prices; and any activity to enforce them necessarily has that effect (*Dikeou v. Food Distributors Association*, 108 Pac.(2d) 529, 107 Colo. 38). Granting interstate commerce, in the absence of the State statute it might be assumed that activity to effectuate the economic policy embodied in such a statute would violate the Sherman Act. Consequently,

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10. Mr. Justice Shenk in *Max Factor & Co. v. Kunsman*, 5 Cal.(2d) 446, 478; 55 Pac.(2d) 177:

> "it appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws."

11. "There is a great body of fact and opinion tending to show that price cutting by retail dealers is * * * injurious to the general public. * * * The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned." *Old Dearborn Co. v. Seagram*, supra, at p. 195.

12. *Wholesale Tobacco Dealers v. National etc. Co.*, 11 Cal.(2d) 634, 82 Pac.(2d) 3; *Dikeou v. Food Distributors Association*, 107 Colo. 38, 108 Pac.(2d) 529, 534. But approximately twenty-three of the thirty states have provided in their Unfair Practices Acts for definite minimum markups. (The statutes are assembled in 2 *C.C.H. Trade Regulation Service* (9th ed.), at p. 7503, et seq.)

resting on an asserted conflict between the State Act and the Sherman Act and upon the blunt force of superior sovereignty, the government here claimed that the State Act was an immaterial factor. On that theory the convictions rested.

That theory is predicated on a view of the Sherman Act which is contrary to the view stated in *Parker v. Brown, State Director of Agriculture of California*, 317 U.S. 341, decided after the judgment of the trial court here.

The question is not one of power of the federal government to override state policy as expressed in state legislation, but of construction of the Sherman Act. *That Act is not aimed at restraints imposed by state action* (*Parker v. Brown*, supra). The policy and standard sought to be enforced by petitioners were not created by private agreement or sought to be imposed by "their will"; they were fixed by "legislative command of the state" (*Parker v. Brown*, supra).

Federal acts should be construed to avoid conflicts between state and federal power. The implied range of federal acts must be determined "with a due regard for a proper adjustment of the local and national interests in the federal scheme" (*Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, 351), and "to the implications of our dual system of government" (*A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 520).

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, * * * should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."
>
> *Penn Dairies, Inc. v. The Milk Control Commission*, 318 U.S. 261, at 265.

"As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

Maurer v. Hamilton, 309 U.S. 598, 614; so also *Davis v. Department of Labor,* 317 U.S. 249, 257.

In the court below, the government sought to distinguish *Parker v. Brown* on the ground that there the state had created an administrative bureau to enforce the state command so that the defendants were state officials, whereas here it had not done so. In adopting its social and economic policy, the state had a choice of means of enforcement. It could have created another administrative board, conferring upon it the duty to police all trades, investigate price cutting and enforce the law, or, consonant with an opposing belief that the growth of administrative law was to be deprecated, it could have left to private initiative the enforcement of the principles adopted by it, relying on individual citizens and trade associations to investigate violations, make surveys, and initiate complaints or proceedings.

The latter course is the traditional and earlier method of Anglo-American law, and many believe its growing displacement by administrative methods to be unwise.[13] The California Legislature may have been of this mind, or it may have preferred to leave the expense of enforcement to trade associations.[14] Such

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13. Cf. *Dikeou v. Food Distributors Association,* supra:
"Moreover, unlike most laws of this character, enforcement is left to the courts instead of to an administrative board. This should be of interest to those members of the legal profession who favor the judicial method, as a confirmation of their belief, if experience justifies it, that in such procedure more impartiality and fairness will result. The method of its enforcement is, of course, controlled by legislative authority and not by judicial sanction." (p. 534)

14. In the *"Final Report of the Attorney General's Committee on Administrative Procedure"* (U. S. Government Printing Office, 1941) reasons

questions of wisdom and choice do not concern us. But, certainly, Congress in adopting the Sherman Act in 1890 did not resolve those questions by imposing on states the duty of enforcing legislative policy by administrative bureaus and depriving them of the right to proceed by the more traditional procedure. We submit that the government should not be permitted to fasten upon *Parker v. Brown* such a stilted construction.

The rationale of the principle that price fixing is, *per se,* illegal is that the power to fix prices is too important to leave in the hands of any private group, it being a power "which may be pushed to evil consequences," and that courts should not be required to make a "survey of our economic organization and a choice between rival philosophies" in testing legality (*United States v. Trenton Potteries Company,* 273 U.S. 392, 397; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 226). This rationale does not require the condemnation of associated activity to enforce State Unfair Practices Acts. No power has been conferred on any private group to fix prices; no necessity of inquiring into reasonableness of prices is necessary:—the standard has been fixed by the State Legislature. No survey of economic organization or choice between rival philosophies is required of the courts:—that survey and that choice have been made by the Legislature.

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are stated why administrative agencies are sometimes created to enforce legislative policies instead of leaving enforcement to action in the courts. Of the latter procedure it is said (p. 14):

> "Action must be brought either in the name of the Government or by private individuals. * * * If brought by private individuals, there is cast upon these individuals a burden which it is one of the prime purposes of administrative agencies to avoid. Certain agencies, it is essential to recognize, represent an effort, whether wise or unwise, to place upon the Government—rather than upon millions of people of often limited resources—a large share of the responsibility for making effective policies which the people through their Government have declared."

The Sherman Act does "not prevent adoption of reasonable means to protect * * * commerce from destructive or injurious practices and to promote competition on a sound basis" (*Sugar Institute, Inc. v. United States*, 297 U.S. 553, 597). The State Legislature having selected the *Unfair Practices Act* as a means of protecting commerce from destructive and injurious practices and promoting competition on a sound basis (so declared in Section 13), and as part of that means having empowered trade associations to aid in its enforcement, the courts should not declare it to be an unreasonable means.

The Sherman Act is directed only at restraints which in some way "take from buyers or consumers the advantages which they derive from free competition" (*Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497, 500). But the type of selling which petitioners sought to prevent was not an advantage to which consumers were legally entitled in California.

2. The decision affirmed by the Circuit Court of Appeals has decided an important question of federal law in a way which is in conflict with applicable decisions of this Court and of other Circuit Courts of Appeals.

In holding, on the record in this case, that interstate commerce is involved so as to bring the case within the purview of the Sherman Act, the decision is in conflict with the principles subsequently enunciated in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, which rejected a concept of interstate commerce less extreme than that which the government urged and the District Court here applied.

Its extreme character is readily apparent:—

Petitioners' activities were wholly local. We assume that the Sherman Act may be violated by local activities if (1) interstate commerce is substantially affected, or if (2) the object and

purpose of the conspiracy are to restrain or affect interstate commerce. But, as respects intent, the government conceded that petitioners had no intent or purpose to restrain or affect interstate commerce; their objective was a local situation. (Cf. *Industrial Association of San Francisco v. United States,* 268 U. S. 64; *Schechter Corp. v. United States,* 295 U. S. 495.) As respects effect, the only effect on interstate commerce charged in the indictment is that the amount of groceries shipped into Northern California was directly and substantially diminished (para. 21, R. 11). The government conceded, however, that this charge was not proved and that petitioners' activities had *no* effect on the "flow" of groceries into California.[15] No other tangible effect on interstate commerce has been suggested. Instead, the government urged that price fixing is, *per se,* illegal, without regard to effect. We submit that while price-fixing activities *in* or directed to the objective of interstate Commerce may be, *per se,* violative of the Sherman Act, activities neither *in* nor *aimed at* interstate commerce must have an actual effect on interstate commerce in order to fall under the ban of the Act.[16]

The bald question presented was whether, from the aspect of interstate commerce, the Sherman Act is concerned with price activities relating to retail sales made in the State of California by California retailers simply because some goods have originated outside of the state, having first come to wholesaler's warehouse or retailer's shelves in this state. The government claimed that it did, on an extreme "stream-of-commerce" theory

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15. Consequently, no questions arise here by reason of the replacement of the old term "directly and necessarily" by the new term "substantially." *Wickard v. Filburn,* 317 U.S. 111.

16. "I do not understand the authorities to hold that a mere charge that there was an intrastate combination directed to the fixing of prices in an intrastate market is alone sufficient to bring such a conspiracy within the reach of the Sherman Act." *United States v. French Bauer, Inc.,* 48 F. Supp. 260 (Sept., 1942). Cf. *United States v. Sheffield Farms,* 43 F. Supp. 1.

whereunder the retail sales were to be considered as still part of the interstate commerce.

If the Sherman Act is applicable on this record, no field of merchandise distribution can be conceived of where the Act is inapplicable, and, if the Sherman Act displaces the State Unfair Practices Act here, in no field of merchandise distribution may a state establish its own policies or concept of social desirability of price practices.

The government's position is contrary to the principles of *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins v. Carr Bros.*, 317 U. S. 572.

It conflicts with the principles stated in decisions of other Circuit Courts of Appeals (*Ewing-Von Allman Dairy Co. v. C and C Ice Cream Co.*, 6 Cir., 109 Fed. (2d) 898; cer. den. 312 U. S. 689; *Walling v. Goldblatt Bros.*, 7 Cir., 128 Fed. (2d) 778; *Albrecht v. Kinsella*, 7 Cir., 119 Fed. (2d) 778).[17]

Save for a minute fraction which goes directly to retailers, all groceries coming into California from without come to rest, according to the record, in central warehouses in this state, whether maintained by wholesalers, cooperative jobbers, or chain organizations, whence they are later distributed to retail outlets (see p. 10, supra).

No evidence was offered to show that any of the goods "were different from goods acquired and held by a local merchant for local disposition" (*Walling v. Jacksonville Paper Co.*, supra). Indeed, a case relating to an entire industry, as the present case does, rather than to the business of a particular company, would seem necessarily to be governed by the rules applicable to the usual and not unusual methods of merchandise distribution.

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17. For a carefully reasoned District Court decision, cf. *Walling v. Mutual Wholesale Food & Supply Co.*, 46 F. Supp. 939.

After reaching the central warehouses, the goods have ceased to be *in* interstate commerce. But apart from that, when thereafter they reach the retailer's shelves, certainly they cease to be in interstate commerce. Unless the subsequent retail sale is still "in the stream of commerce," the Sherman Act cannot here apply.

In the absence of any unusual facts, and there are none in this record, retail distribution is a business of purely local concern exclusively within the jurisdiction of the state. (*East Ohio Gas Co. v. Tax Commission,* 283 U. S. 465, 471; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U. S. 498, 504; *Public Utilities Commission v. Landon,* 249 U. S. 236; *Walling v. Jacksonville Paper Co.,* supra; *Ewing-Von Allman Dairy Co. v. C and C Ice Cream Co.,* supra; *Veazey Drug Co. v. Fleming,* 42 F. Supp. 689, 695; *Walling v. Mutual Wholesale Food & Supply Co.,* supra.)

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision.

Although the two main issues had been, at the trial, sharply and deliberately framed by the government so as to make a decision upon them unavoidable, in order that the case would serve as a test case, the Circuit Court of Appeals refused to pass upon and failed to answer either question presented. Its mode of proceeding is indefensible; its opinion is based on assertions of fact which are wholly erroneous, which were never made by the government, and which, we are confident, government counsel will not endeavor to support; it proceeds on grounds *not available* to the court and not urged by the government.

The consequences of the failure of the Circuit Court of Appeals to decide the issue of the Unfair Practices Act are

more devastating and injurious than any decision it might have made on the subject. The retail trade in California—in every state—is left in dismayed confusion, for the government in the trial court had declared that it considered *any* activities of trade associations under an Unfair Practices Act to be violative of the Sherman Act, the trial court had approved that theory, and upon that theory petitioners were convicted. The convictions having been affirmed, no one can now possibly dare to endeavor to enforce these state laws. The prosecution will have accomplished its end by fear and intimidation rather than by forthright decision.[18]

The Circuit Court refused to decide the issue of the Unfair Practices Act because, so its opinion has it, the petitioners had not stayed within the confines of that Act in that they had ignored its requirement that sales below cost must have been made with intent to injure a competitor. In this respect the court overlooked the fact that, under the 1937 amendment to Section 3 of the Act, "loss-leader" sales are prohibited without regard to any subjective intent, but solely on an objective standard of diversion of trade from competitors or other actual injury to competition. But wholly apart from the 1937 amendment, *the question whether petitioners had gone beyond the State law*

18. The confusion "is worse confounded" because in *United States v. Food and Grocery Bureau of So. Calif.*, 43 F. Supp. 966, 43 F. Supp. 974, in the District Court for the Southern District of California, Judge Yankwich had said that bona fide enforcement of the Unfair Practices Act would not violate the Sherman Act. That case was argued in the Circuit Court of Appeals months before the instant case, but the two were decided the same day, and the Circuit Court of Appeals expressly refrained from approving Judge Yankwich's view of the law. The opinion of the Circuit Court of Appeals assumes that the record in the Southern case and that in the instant case are the same. In fact, they are wholly different. The issue on the appeal in the Southern case was whether there was sufficient evidence to support the finding that defendants there had gone beyond the confines of the State law. Here the issue was whether the trial court erred in declining to decide at all whether petitioners had gone beyond or stayed within the confines of the State Act. That issue did not have to be decided on the appeal in the Southern California case; here it was inescapable.

was not before the Circuit Court of Appeals; the ground of its decision was not available to it. The petitioners had implored the trial court to pass on the question of fact whether their conduct was in conformity with the State Act, but the trial court declined to do so. It sustained the government's contention, and it excluded evidence which, if admitted, would have tended to show that conformity. The very point of the appeal was that the trial court erred *in refusing to consider* whether appellants stayed with, or went beyond, the State law provisions, and in rejecting evidence material to that consideration. *Government counsel conceded that such was the issue presented by the appeal* (see p. 7, supra). Yet the Circuit Court of Appeals affirmed, not on the ground that the trial judge was right in refusing to consider any evidence as to such conformity, but by proceeding to weigh, and to choose from, the partial evidence on the point which had come into the record and by concluding, *as if it were a trial court,* that appellants went beyond the terms of the statute. Petitioners were thus deprived of the trial of the issue in a trial court, a trial which they sought in vain in the District Court.

The Circuit Court of Appeals' assertion that the petitioners ignored the intent feature and had not informed the trade of it is predicated on a statement that not until a year before the indictment had petitioners referred to that feature in their communications with the trade. That statement is absolutely incorrect. A mass of written and oral evidence to the contrary is in the record;[19] the trade was informed by bulletins, early and late;

19. For example, U. S. Ex. 40, R. 492, 493; Def. Ex. T-3, R. 765, 769; U. S. Ex. 31-1, R. 451; R. 937, 938 (Assignment of Error 56); R. 638, 613-615 (Assignment of Error 52, R. 935); R. 621, 936, 429, 430, 431, 432, 574; U. S. Ex. 15-15, R. 106; Def. Ex. I, R. 620; R. 621 (Assignment of Error 54, R. 936); Def. Exs. G and G-1, R. 604; R. 733 (Assignment of Error 78, R. 962); U. S. Ex. 15-34, R. 120; Def. Ex. P-5, R. 658; R. 638, 639, 686.

full texts of the Act were distributed; the intent feature was explained orally and understood by the trade, as every government witness on the subject admitted (e.g., R. 429, 574); petitioners repeatedly had the Act explained to meetings of the trade by district attorneys. Whether, upon weighing and appraising the whole record of evidence admitted and improperly excluded and judging the intended effect of petitioners' bulletins and the manner in which they were received and understood by the trade in the entire factual context in which they were issued, a court could justifiably conclude that petitioners had ignored the intent feature of the State law, was not the issue before the appellate court. No such appraisal had been made by the trial court; *no such contention had even been made by the government.* Petitioners' explicit efforts to have the trial court consider this very question of the intent feature had failed.[20]

Where a conviction is based on a general verdict, and where one of the theories on which the case was tried and submitted

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20. Note the following, which occurred upon an offer of evidence:

"Mr. Alioto: In view of the positive language in the Socony case that economic benefit cannot justify price fixing and conspiracy, I object to this as irrelevant.

Mr. Lasky: I am not trying to show an economic benefit; I am trying to show something else.

The Court: If we are not in economics, where are we?

Mr. Lasky: Does your Honor want me to explain?

The Court: Yes.

Mr. Lasky: I will explain by saying that the law provides that any selling below cost with intent to injure a competitor is illegal. The indictment alleges we misrepresented the intent feature. I think it is in point to show that these defendants knew that wherever there was a sale below cost, competitors were in fact hurt, and under the amendment to the law in 1937 that was presumptive evidence he had intended to violate the law. As to the other point of view, that the state law has nothing to do with this case, we want to present to your Honor for your Honor's judgment the whole facts, and not only a partial statement of the facts."

The evidence was first admitted (R. 616), but later it was stricken (R. 838, 843, 854; Assignment of Error 53, R. 935).

is incorrect, the judgment may not be supported on the supposition that it was rendered on a correct theory (*Williams v. North Carolina,* 317 U. S. 287; *Viereck v. United States,* 318 U. S. 236.) *A fortiori,* where a trial is by the court alone, and the court makes it clear that its judgment is based on a given theory and that it refuses to decide any question of fact material under another theory, and where it excludes evidence admissible under the latter theory, an Appellate Court cannot be free to explore the record, or to weigh the excluded evidence, as if it were a trial court, in order to find evidence on which the defendant might have been convicted on that other theory.[21] Here, for example, evidence bearing on cost and cost surveys was excluded. The exclusion was justified by the Circuit Court of Appeals on the ground that, as petitioners had gone without the confines of the State Act in respect of its "intent" provisions, it was unnecessary for the trial court to consider whether they were within its confines with respect to its cost provisions. The fallaciousness of such reasoning is apparent from the fact that at the moment when some of this evidence was excluded (e. g., R. 771, et seq., and Def. Ex. U for Identification), the defendants' case was not yet closed; the trial court could not yet have, with judicial propriety, formulated any conclusions concerning the defendants' regard of the "intent" feature

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21. Cf. *West Coast Life Ins. Co. v. Crawford,* 58 Cal. App.(2) 771, 774, 138 Pac.(2) 384: "All that we are saying is that as a matter of law inferences favorable to the plaintiff could have been drawn from exhibit 7 had it been received in evidence. The possibility that the trial judge would not have drawn such inferences does not retrieve from error the ruling rejecting the exhibit."

Mashbir v. Mashbir, 29 Cal. App.(2) 733, 737; 85 Pac.(2) 482: "There is no merit in the contention that the error is not prejudicial * * *. As the record is presented to this court the trial court did not consider the evidence as set forth above before making its findings of fact, and we cannot say that, had the trial court received the excluded evidence and given it due consideration, a different result would not have ensued."

(cf. *Bates v. Oregon-American Lumber Co.*, 9 Cir., 295 Fed. 1, 5). The fact that success on one issue will be of no avail unless another issue is sustained does not justify exclusion of an offer of proof on the former (64 C.J. 130). The evidence was rejected with this interchange:

> "The Court: *Do you want a record on it?*
> Mr. Lasky: Yes.
> The Court: Objection sustained." (R. 772)

Patently, what the trial court desired to give petitioners "a record on" was its ruling that the State Unfair Practices Act was wholly immaterial and its refusal to pass on any question connected with it; certainly not that it excluded the cost evidence because it had, midstream, arrived at some adverse conclusion on another question of fact.

Had the government at the trial as much as intimated a contention that petitioners had ignored the "intent" feature, and had the trial court not made it crystal clear that it would consider all evidence relative to the State Act to be immaterial and would exclude any such evidence, further evidence could have been offered on the subject. Where a trial judge makes it clear that he regards an entire class of evidence as immaterial, where he makes it manifest what issues he regards as material or immaterial, the error is preserved to the aggrieved party. (*Caminetti, Insurance Commissioner v. Manierre*, 23 A.C. 93, 98 99; 142 Pac.(2) 741 (Cal. Sup. Ct., Oct., 1943); *Bates v. Oregon-American Lumber Co.*, 9 Cir., 295 Fed. 1, at 5; *I Wigmore on Evidence* (3rd ed.), Sec. 17, p. 318).

If associated activity to enforce the State Act is itself a violation of the Sherman Act, we submit that it should be so announced. If it is not a violation of the Sherman Act, then petitioners are entitled to have the cause remanded for a new trial, so that they may have the issue of fact, whether they stayed

within or went beyond the confines of the State Act, decided by a *trial court,* after all material evidence has been received.

With respect to the issue of interstate commerce, the opinion of the Circuit Court of Appeals has only this to say:

> "Again as in the Southern California case, the conspiracy aimed to fix all minimum retail prices *whether of an out-of-state wholesaler making an interstate sale* or a retailer selling goods he had imported from out-of-the-state or intrastate sales by retailers of goods produced within the state. The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, *whether interstate* or intrastate." [Italics added.]

If by this the court meant to denominate as an interstate sale the local resale in retail trade of goods theretofore brought into the state, it begs the question. If it meant something more, we say without reservation that the statement has no foundation in the record. *The question is not one of weighing evidence, analyzing it, or discussing particular facts.* There is simply not a scrap of evidence of any activity of the petitioners in any way directed at, connected with, or affecting out-of-state wholesalers making interstate sales or with respect to the prices charged by out-of-state wholesalers. *The government has never even claimed that there was any such evidence or any such element in this case.* "Purpose" to stabilize interstate trade may only be inferred from (a) evidence of state of mind, or (b) from acts and effect. Here the government conceded that there is no evidence of effect on interstate sales or of any act directed toward such sales, and the trial court excluded all evidence as to petitioners' state of mind and purpose (see p. 9, supra). The assertion of the Circuit Court of Appeals is a purely gratuitous assumption that

what was true in another case involving a different group of trade associations in Southern California was true of petitioners in Northern California.[22]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: San Francisco, California, March 6, 1944.

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22. Moreover, the indictment charges a conspiracy to fix retail prices, not whosesale prices. There is some reference to the latter as one of the means of fixing retail prices, but there is no evidence relating to wholesale prices after early 1937 (which is before the period of the statute of limitations), and that evidence relates solely to "wholesalers in Northern California" selling to retailers in that area (R. 250, 253, 256, 259).

(APPENDIX FOLLOWS)